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IN THE
United States Supreme Court

OCTOBER 1998 TERM

PATRICK L. TESSIER,
Petitioner

V.

IN RE: COMBUSTION, INC.
PLAINTIFFS' STEERING COMMITTEE,
Respondents

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

Michael C. Smith
Counsel of Record for Petitioner
2031 Louisiana Ave.
Baton Rouge, LA 70806
(225) 354-1265

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SUMMARY OF THE ARGUMENT

Patrick L. Tessier has limited his Petition for Writ of Certiorari to the issues actually decided by the Fifth Circuit Court of Appeals and the district court for the Western District of Louisiana. The Fifth Circuit equated the district court's difficulties with Mr. Tessier's credibility concerning any knowledge of the lawsuit with a finding of actual notice. See Petitioners' Appendix at pp. 15a and 4a. Accepting but not agreeing with the Fifth Circuit's interpretation, Mr. Tessier asserts that knowledge of the existence of a litigation does not equate with receipt of notice, especially where there is no evidence he knew any of the information Rule 23 notice would have afforded. The ruling of the Fifth Circuit illegally and unconstitutionally places a duty and burden on Mr. Tessier to investigate his rights and obligations and to prove what he did not know.

The Combustion, Inc. Plaintiff's Steering Committee (hereafter, Plaintiffs' Steering Committee), Respondents herein, offers no law in their opposition on these issues.

The Plaintiff's Steering Committee appears to attempt to confuse and misdirect the Supreme Court with their arguments. They argue the adequacy of notice by publication and general dissemination of information despite the clear direction of this United States Supreme Court in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed. 732 (1974) and the clear direction of the Fifth Circuit in its opinion on remand in this matter. Petitioners App. at 25a and 26a. They argue matters not addressed even by the district court concerning whether Mr. Tessier's name and address could have been identified through reasonable effort. In support of their arguments, the Plaintiffs' Steering Committee offers speculations but no facts concerning what Mr. Tessier and the district court thought, meant or knew. That Mr. Tessier reads the newspaper or had opportunity to speak with people is no proof that he had specific information concerning the Combustion, Inc. class action litigation. The district court stated its reasoning in its Ruling at Pet. App., p. 5a *et seq.*. This Ruling needs no amplification from the Plaintiffs' Steering Committee's speculation.

Management of class actions is cumbersome, but the difficulty of management does not lessen the class representatives' duty to notify identifiable class members. Placing the duty to investigate and the burden of proof on class members is a constitutionally and legally infirm practice under the Fourteenth Amendment and Rule 23.

ARGUMENT AND AUTHORITIES

Patrick L. Tessier respectfully submits this reply brief to rebut arguments and representations made by the Combustion, Inc. Plaintiffs' Steering Committee, the Respondents herein.

I. Issues before the Court

The issues raised by Mr. Tessier in his Petition for Writ of Certiorari stem from and are directly related to the written decisions of the district court and Court of Appeals for the Fifth Circuit. In its Ruling, Pet. App., p. 15a and Resp. App., p. 3a, the district court concluded as follows:

> While he (Mr. Tessier) may not have received any written notification, this Court has great difficulty giving credence to his testimony that he had no knowledge of the law suit.

See also Pet. App., pp. 5a and 9a.

While grammatical construction of the district court's language does not necessarily lead to a conclusion that the district court found Mr. Tessier had any knowledge of the litigation, the Fifth Circuit construed the district court's statement and action to conclude the following at Pet. App., p. 4a:

> On remand, the district court found that Tessier had actual notice of the litigation and, therefore, determined that individual notice was not required.

Mr. Tessier maintains that he had no knowledge of the litigation. He does, however, accept that he would have little success challenging the Fifth Circuit's construction of the language.

Whatever difficulty the district court had with Mr. Tessier's credibility, there was no evidence presented, and the district court cited none in its Ruling, that Mr. Tessier had any knowledge of the information that Rule 23 (c)(2) notice would have provided. At best, the district court concluded Mr. Tessier had some knowledge of the Combustion, Inc. litigation. The Plaintiffs' Steering Committee's offers only speculation as to what Mr. Tessier may have read in the newspaper or might have heard from others to conjecture what specific information Mr. Tessier had concerning the litigation.

Mr. Tessier asserts that it is constitutionally and legally impermissible to equate a finding of some knowledge with the receipt of Rule 23(c)(2) notice and all the information required to be conveyed therein. Mr. Tessier also asserts that if he is an identifiable class member, he has no duty to inquire into his rights and obligations, at least not until he has the knowledge that notice under Rule 23(c)(2) would provide. He further asserts that without specific evidence of the particular knowledge that Rule 23(c)(2) notice would have afforded him, the Fifth Circuit and the district court placed the burden on him to prove what he did not know – a generally impossible task – in contravention of the Fourteenth Amendment and Rule 23 of the Federal Rules of Civil Procedure.

II. The Size of the Bell that "Did Not Ring" and Other Irrelevancies

A. Effect of Notice by Publication

Even though the argument bears little relevance to the issues raised by Mr. Tessier in his Petition for Writ of Certiorari, the Plaintiffs' Steering Committee argues throughout their opposition that their efforts at notifying class members were adequate under the circumstances of this litigation even as to identifiable class members. They do so even though the efforts cited by the district court in its

own Ruling and the Summary of PSC Operations provided at Resp. App., p. 4a *et seq.* show no notification sent to any class member who was not first known to the Plaintiffs' Steering Committee. Evidence at the hearing of this matter clearly established that no one was notified pursuant to Rule 23(c)(2) even though large numbers of class members were identifiable from the public records of Livingston Parish, Louisiana.

The Fifth Circuit stated as follows in its first opinion in this matter, Pet. App., pp. 25a-26a:

> Federal Rule of Civil Procedure 23(c)(2) provides "[i]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort..." Fed.R.Civ.P. 23(c)(2). In Eisen v. Carlisle & Jacqueline, the Supreme Court held "the importance of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses are ascertained through reasonable effort." Eisen, 471 U.S. at 1173; See also In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1097 (5th Cir. 1997)(stating that publication is not a substitute for personal notice if the individual's name and address were ascertainable through reasonable efforts).
>
> Mr. Tessier argues that his name and addres were readily discernible from the public records of Livingston Parish. If reasonable efforts would have uncovered his name and address, Mr. Tessier did not receive the personal notification to which he is entitled. Moreover, if he did not receive personal notification to which he is entitled, this amounts to good cause for not filing a timely proof of claim.

For the Plaintiffs' Steering Committee to now argue that their general effort to notify class members by publication were sufficient is disingenuous and at odds with the specific holding of this Supreme Court and of the Fifth Circuit in this matter.

B. Reasonable efforts to identify class members is not an issue here

The Plaintiffs' Steering Committee asks the Supreme Court to consider matters even the district court has not yet considered. Despite the direct order of the Fifth Circuit on remand, Pet. App., p. 27a, the district court has yet to consider whether reasonable efforts could have uncovered Mr. Tessier's name and address. These arguments are clearly inappropriate for review at this time.

Without going into great detail here on the issue of identifiability of class members, Mr. Tessier asserts that the contentions of the Plaintiffs' Steering Committee outlined at pp. 22 and 23 of their opposition brief are particularly disingenuous and incorrect. While there may not have been a permit application in the records from Mr. Tessier prior to 1995, his name appeared on indexes there at all pertinent times as a permittee. Resp. App., p. 58a. Anyone searching for Mr. Tessier could have taken his name over to the tax assessor's office and found his address. Resp. App., p. 61a. Further, the tax rolls contained a list of 60,000 entries of property listed by owner and address, Resp. App., p. 38a. All these owners, including Mr. Tessier, were identifiable class members. It would be difficult, as the Plaintiffs' Steering Committee suggests, to isolate just 20,000 of these owners, but such isolation would be pointless where all the property owners of Livingston Parish, Louisiana were class members. The tax assessor's roles listed virtually all of them.

C. The size of the bell that did not ring

The Plaintiffs' Steering Committee infers that counsel for Mr. Tessier deliberately omitted a material word from the transcription of the district court's ruling when the adjective "big" was omit-

ted from the transcription in reference to the bell Mr. Tessier said did not ring when he read the newspapers. The transcript of this matter shows that Mr. Tessier actually used the adjective "large". See the Plaintiffs' Steering Committee brief at p. 16. The district court's Ruling and the transcript provided show Mr. Tessier maintained he had no recollection of having read any notices in the newspapers. The size of the bell that did not ring is immaterial.

Nonetheless, counsel for Mr. Tessier here apologizes to the Court and to opposing counsel for the unintentional omission. Counsel for Mr. Tessier failed to catch the omission while editing the document. Counsel for Mr. Tessier would never intentionally jeopardize his credibility with the Court or give the Plaintiffs' Steering Committee an issue to contest. Please forgive the oversight.

D. Sidelining and other speculations

The Plaintiffs Steering Committee's brief is replete with unsubstantiated speculations about what motivated Mr. Tessier and the district court. Mr. Tessier suggests that had the Plaintiffs' Steering Committee done a proper analysis of which class members were identifiable with reasonable effort, it would not need to try to make an issue of Mr. Tessier's knowledge or motives. Nor would the Plaintiffs' Steering Committee need to speculate about the inferences the district court could have drawn. Rather, they could have safely pointed to their analysis and stated Mr. Tessier either was or was not identifiable with reasonable effort, and, therefore, entitled to notice or not.

Particularly absurd is the Plaintiffs' Steering Committee's speculation about sidelining by Mr. Tessier. Given the notice requirements of Rule 23(c)(2), Mr. Tessier would be playing a dangerous game with everything to lose and nothing to gain. Filing a timely proof of claim would have been a risk free way to protect his rights.

CONCLUSION

The issues before this court stem from the holdings of the Fifth Circuit Court of Appeals and the district court for the Western

District of Louisiana equating knowledge of the existence of a lawsuit with notice sufficient to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure and of the United States Constitution, Amendment XIV. Such practice is legally and Constitutionally infirm. It places duties and burdens on class members to investigate and secure their rights before they know they have any interest in class action litigation. Knowledge is not notice.

While management of class actions may be cumbersome, the difficulties do not lessen identifiable class members' right to the fundamental and elementary requirement of due process that they be notified of their rights and obligations in a pending litigation. There is no evidence or finding in the record that Mr. Tessier had any actual knowledge of the information Rule 23(c)(2) notice would have provided him.

A practice that equates knowledge with notice, imposing a duty on a class member to investigate his rights before he reasonably knows he has any, while placing the burden of proof on him to prove what he does not know, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's jurisdiction. Mr. Tessier again asks this Court to grant a writ of certiorari in this matter.

Respectfully submitted this 2nd day of April 1999.

Michael C. Smith
2031 Louisiana Ave.
Baton Rouge, LA 70806
(225) 354-1265